UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: SOCIAL MEDIA ADOLESCENT ADDICTION/PERSONAL INJURY PRODUCTS LIABILITY LITIGATION

This Filing Relates to:

*Leslie Smith v. Meta Platforms, Inc.*,
Case No.: 4:23-cv-05632

MDL No. 3047

Case Nos.: 4:22-md-03047-YGR-PHK

**JOINT LETTER BRIEF REGARDING JESSICA SMITH CLAWBACK OF MENTAL HEALTHCARE RECORDS**

Judge: Hon. Yvonne Gonzalez Rogers
Magistrate Judge: Hon. Peter H. Kang

Dear Judge Kang:

Pursuant to the Court's Standing Order for Discovery in Civil Cases, the PI/SD Plaintiffs and Defendants respectfully submit this letter brief regarding a dispute regarding Jessica Smith's clawback of mental healthcare records.

Pursuant to the Discovery Standing Order and Civil Local Rule 37-1, the Parties attest that they repeatedly met and conferred by video conference, correspondence, and telephone before filing this brief. The final conferral was held on February 25, 2025 via videoconference and was attended by lead trial counsel for the Parties involved. Lead trial counsel have concluded that no agreement or negotiated resolution can be reached.

Dated: March 10, 2025

Respectfully submitted,
*/s/ Lexi J. Hazam*

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**Defendants' Position:** Plaintiff Jessica Smith signed up her now 20-year-old daughter, Plaintiff Leslie Smith, for this litigation. Jessica Smith asserts a derivative claim for medical expenses, contending that Defendants' platforms contributed to her daughter's mental health issues and harmed their relationship. As part of discovery, Jessica Smith produced 13 emails with her therapist. This includes two documents reflecting communications between Jessica Smith and her therapist (LCHB-SMITH-003-00052117 and LCHB-SMITH-003-00028737) that squarely refute Plaintiffs' claims that Defendants caused Plaintiffs' injuries and are potentially outcome determinative on the issue of alternative causation.[1]

Jessica Smith now seeks to claw back these two relevant documents based upon the patient-therapist privilege.[2] As set forth below, Illinois law and the fundamental fairness doctrine make clear that these documents are not privileged. Further underscoring the lack of merit to their clawback demand, Plaintiffs have taken the remarkable position that Defendants are not allowed to describe the disputed documents in this submission to the Court, and that the Court is prohibited from reviewing those documents *in camera*, thereby depriving the Court of the requisite information to exercise its judicial function. Accordingly, Defendants respectfully request that the Court: (1) allow Defendants to submit a supplemental 1-page brief under seal that allows them to describe the documents and order them produced for *in camera* review; (2) deny Plaintiffs' request to claw back the two documents at issue; and (3) order Plaintiffs to produce a very limited set of Jessica Smith's medical records relating to Leslie Smith's health or well-being.

**A. The Court Should Conduct An *In Camera* Review.** Plaintiffs have insisted that Defendants not describe the documents at issue in this brief, even if it is filed under seal, and have refused to allow the submission of a joint brief that does so, even in general terms. That is improper and unfair: being able to describe the documents to the Court is critical to explain why they are not privileged under Illinois law and the fundamental fairness doctrine. Plaintiffs themselves did so in briefing an earlier, unrelated privilege challenge. *See* ECF Nos. 1375, 1376.

Worse yet, Plaintiffs have taken the position that even *in camera* review of the documents is forbidden. But *in camera* review is expressly permitted by the Federal Rules and necessary to allow the Court to assess whether the documents are privileged, including under Illinois' fundamental fairness doctrine. Fed. R. Civ. 26(b)(5)(B) ("If information produced in discovery is subject to a claim of privilege . . . a party . . . may promptly present the information to the court under seal for a determination of the claim."); *United States v. Zolin*, 491 U.S. 554, 572 (1989) (threshold standard for *in camera* review "need not be a stringent one"). The Court already has reviewed documents *in camera* to assess the parties' dispute regarding claims of attorney-client privilege. *See* ECF Nos. 1620. Such review is also expressly provided by the governing Illinois patient-therapist privilege statute. 740 ILCS 110/10(a)(1) ("Records and communications may be disclosed . . . after *in camera* examination"). Accordingly, the Court should allow Defendants to

[1] Defendants disagree with Plaintiffs' privilege assertions with respect to the 11 other documents. However, because those 11 documents do not contain similarly relevant information to the two documents at issue, Defendants do not challenge Plaintiffs' attempt to claw them back.

[2] Defendants have destroyed the documents at issue pending this challenge. Any reference to them is based on counsel's recollection.

submit a supplemental 1-page brief under seal that describes the documents and order them produced for *in camera* review.[3]

**B. The Documents Are Not Privileged.** To sustain a privilege claim, Jessica Smith must prove that each communication meets each element of that privilege. *See United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997). Illinois law governs Jessica Smith's claim of patient-therapist privilege in this diversity action. Fed. R. Evid. 501.[4] Under Illinois law, "the therapist-recipient privilege … is not absolute," *D.C. v. S.A.*, 178 Ill.2d 551, 559 (1997). There are statutory exceptions, 740 ILCS 110/10(a)(1)–(12), and the privilege otherwise yields when fundamental fairness requires it, *D.C.*, 178 Ill.2d at 566–570. The emails at issue are not privileged.

Jessica Smith's assertion of the therapist-patient privilege fails under Illinois' well-settled fundamental fairness doctrine. The Illinois Supreme Court has expressly held that 740 ILCS 110/10 does not bar the disclosure of therapist-patient communications, and, in fact, such documents must be disclosed where the "interests of fundamental fairness and substantial justice outweigh the protections afforded the therapist-recipient relationship." *D.C.*, 178 Ill.2d at 570. That is precisely the case here.

Jessica Smith asserts her own claim for "medical expenses" that is derivative of Leslie Smith's claims and requires Jessica Smith "to successfully establish an underlying claim." ECF No. 1730 at 25–28. Jessica Smith therefore must show that Defendants' platforms caused Leslie Smith's alleged injuries and, as a result, her own alleged injuries. The two documents at issue are potentially dispositive of these claims, including alternative causation. These documents carry the potential to refute causation of Plaintiffs' claims, and, at a minimum, reinforce Defendants' contributory negligence defense. Furthermore, the information in these documents cannot be obtained from another source, since Jessica Smith gave deposition testimony contradicting her communications in the documents.[5] Jessica Smith cannot sue Defendants and use the patient-therapist privilege to shield unique information that potentially undermines the claims brought by her and her daughter. The Illinois Supreme Court held that in such circumstances, "fundamental fairness commands that the privilege yield." *D.C.*, 178 Ill.2d at 566-570 (plaintiff cannot use patient-therapist relationship in negligence action "to prevent disclosure of relevant, probative, admissible, and not unduly prejudicial evidence" regarding causation); *In re Kimberly C.*, 2011 WL 10481304, at *7 (2011 IL App (3d)) (affirming admission of patient-therapist communications because "recipients of mental health services cannot use the privilege as a sword to manipulate the legal system."); *Ligon v. O'Connell*, 1998 WL 89300, at *12 (N.D. Ill. 1998) (mental health records with "potential to fully negate" plaintiff's claim are "non-privileged").

Plaintiffs rely upon *Norskog v. Pfiel*, 197 Ill.2d 60 (2001), but that case presents the exact opposite situation. There, a wrongful death lawsuit was filed against a convicted murderer and his parents, and the plaintiff sought the murderer's mental health records. The defendants objected. The Court found that, unlike here, the defendants were not hiding behind the privilege and were

[3] Plaintiff's failure to provide a proper privilege log further supports *in camera* review. Plaintiff's log does not contain the required narrative description or topic field. *See* ECF 740.

[4] Jessica Smith lives in Illinois and communicated with her therapist in Illinois.

[5] Defendants will provide such testimony and any additional details needed at the Court's request or in connection with their proposed 1-page supplemental brief.

"actually hampering their own defense" by claiming privilege. *Id.* at 83. The Court further held that, unlike here, "it does not appear likely, nor does plaintiff allege, that [the son's] mental health records will reveal evidence which, by itself, has the potential to establish plaintiff's claims." *Id.* at 85. Here, in contrast, Plaintiff Jessica Smith is attempting to hide behind privilege assertions to bury potentially outcome-determinative statements that refute both her and her daughter's claims.

Plaintiffs try to distinguish *D.C.*, based on the content of the documents at issue in that case. But *D.C.* is directly on point. There, the plaintiff brought a negligence action against the defendants for hitting him with a car. *D.C.*, 178 Ill.2d at 554. Defendants sought certain medical records showing the plaintiff may have been trying to commit suicide at the time of the accident. Following *in camera* review, the Court in *D.C.* required the documents to be produced because "the information plaintiff seeks to protect potentially contradicts his assertion that defendants were negligent and caused the accident." *Id.* at 569. Moreover, the documents reflected "plaintiff's possible conduct and motivation" regarding the injury, and those plaintiff admissions could not be obtained from another source. *Id.* The same holds true here. The two communications at issue here meet all of these criteria. They should be reviewed and reproduced as not privileged.

**C. Other Medical Records.** The documents subject to this brief are not privileged. But, based upon a flawed view of Illinois law, Plaintiffs have similarly refused to have Jessica Smith sign limited authorizations allowing for the release of targeted medical records pertaining to the alleged causes of Leslie Smith's mental health issues. Given that discovery closes on April 4, 2025 and the critical importance of such documents, Plaintiffs should be required to collect and produce this targeted set of critically important documents. Jessica Smith cannot use the privilege as a sword to shield key statements and admissions that are highly probative of Plaintiffs' claims and Defendants' alternative causation defense. Other information may of course be redacted.

**Plaintiffs' Position:** Jessica Smith's mental health records are private and protected by the psychotherapist-patient privilege. She has not asserted any claim for mental health injuries; her sole claim is for medical expenses related to her daughter Leslie Smith's treatment. Jessica did not initiate Leslie's case, nor has she ever asserted a claim on her daughter's behalf. As an adult, Leslie brought her own claims against Defendants for the mental health injuries she has suffered. While Defendants may seek to shift blame onto Jessica Smith for Leslie's injuries, Jessica's mental health is not an element of Leslie's claims and her records cannot possibly be outcome-determinative. Defendants' attempt to pierce her privilege and invade her privacy is not only legally baseless but also a blatant overreach.

Defendants misstate Illinois law in an unfounded attempt to access this protected information, yet they fail to establish any valid exception to the well-established psychotherapist-patient privilege. The law does not permit Defendants to exploit baseless arguments to pry into privileged records. Their challenge to Ms. Smith's clawback of protected mental healthcare records and request for further privileged records should be rejected outright. Ms. Smith has a fundamental right to keep her medical and mental health records private.

**A. Ms. Smith's Mental Healthcare Records are Privileged.** The psychotherapist-patient privilege protects Ms. Smith's mental health records, including all communications with her therapist. *See Norskog v. Pfiel*, 197 Ill. 2d 60, 73 (2001) (Illinois protects from disclosure "any communication" to a therapist in connection with mental healthcare) (quoting 740 ILCS 110/2).[6] As the Illinois Supreme Court explained in *Norskog*, Illinois' statutory psychotherapist-patient privilege "is carefully drawn to maintain the confidentiality of mental health records." *Id.* at 71. Such records may only be discovered under "explicitly enumerated" exceptions, *id.*, none of which apply here.

The only enumerated exception Defendants attempt to invoke is the litigation exception, but their argument is without merit. Illinois courts have consistently held that the litigation exception applies only where the privilege holder makes "an affirmative claim for mental loss." *Awalt v. Marketti*, 287 F.R.D. 409, 415 (N.D. Ill. 2012) (citing *Thiele v. Ortiz*, 165 Ill.App.3d 983 (1988)). Here, Ms. Smith does not claim personal injury, emotional distress, or any form of mental harm. Her sole claim is for medical expenses incurred on behalf of her daughter, Leslie Smith. Jessica Smith's mental health is not an element of Leslie Smith's claim.

Defendants cannot override the statutory privilege merely by asserting that their theory of the case implicates Jessica's mental condition. Under Illinois law, the privilege may only be waived if the "recipient" of mental-health services personally places their mental condition at issue. *Reda v. Advoc. Health Care*, 199 Ill. 2d 47, 59 (2002) (quoting 740 ILCS 110/10(a)(1)). "If the recipient has not placed [her] mental health at issue, disclosure of the records or

[6] Ms. Smith maintains that all communications between her and her therapist are protected. *See King v. Cook Cnty. Health & Hosps. Sys.*, 177 N.E.3d 381, 388 (Ill. App. Ct. 2020) (The psychotherapist-patient privilege "is broader than the physician-patient privilege, and all communications and records generated in connection with providing mental health services to a recipient are protected unless excepted by law.") (quoting *People v. Kaiser*, 606 N.E.2d 695, 699 (Ill. App. Ct. 1992)).

communications is not permitted." *Id.* at 57. Defendants' misinterpretation of the litigation exception would create an avenue for parties to circumvent privilege protections whenever an underlying case involves mental health injuries.

**B. The Fundamental Fairness Exception Does Not Apply.** Defendants also cannot rely on the fundamental fairness exception, which applies only in "extraordinary circumstances" where the evidence sought is truly exculpatory. *Norskog*, 197 Ill. 2d at 85. Defendants mischaracterize *D.C. v. S.A.*, 687 N.E.2d 1032 (Ill. 1997), in an attempt to justify their request. In *D.C.*, the court permitted disclosure of limited medical records directly related to the plaintiff's conduct at the time of the accident at issue, which suggested a possible suicide attempt. *D.C.*, 178 Ill. 2d at 555. The court allowed only a narrow disclosure of information that did not concern the plaintiff's psychiatric diagnosis, treatment, or progress but was instead potentially outcome-determinative to a central factual dispute—the plaintiff's intent and conduct at the time of the accident. *Id.* at 569. Despite their bald assertion, Defendants cannot plausibly argue that Jessica Smith's privileged mental health communications are similarly determinative. Rather, "there is absolutely no indication that anything that might be revealed in [Jessica Smith's] mental-health records would completely bar [Leslie's] recovery and absolve defendants of liability." *Reda*, 199 Ill. 2d at 62 (citing *Norskog*, 197 Ill.2d at 83–84)

The narrow exception applied in *D.C.* does not justify invoking fundamental fairness simply because a party claims certain documents support their alternative cause theory. *See Reda*, 199 Ill. 2d at 59 ("it is not enough that defendants, under their theory of the case, placed [a plaintiff's] mental condition at issue"). Defendants have failed to establish the type of "truly extraordinary circumstances" required under Illinois law to justify disclosure. *Norskog*, 197 Ill. 2d at 85. Expanding the fundamental fairness exception in the manner Defendants propose would "eviscerate the statutory privilege" and undermine the strong confidentiality protections enshrined in Illinois law. *Id.*

**C. Defendants Lack Basis to Insist on In Camera Review.** Ms. Smith objects to an in camera review of her mental health records because she, as the privilege holder, has not opened the door to disclosure of her private records in any respect. Defendants are not entitled to an in camera review simply by requesting one. Such review constitutes "an intrusion which must be justified" by a proper factual and legal basis. *In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992); *see also Thompson v. NJ,* 403 Ill.Dec 297, 315 (2016) (Denying discovery into privileged records and holding "an in camera review is not necessary where the party requesting the records has not established that the recipient has introduced his or her mental condition as an element of his or her claim or defense.").

Defendants' argument that in camera review is "critical" to determining whether the documents are privileged is fundamentally flawed for multiple reasons. *First*, under Illinois law, the records are privileged by definition. As discussed above, they consist of communications between Ms. Smith and her therapist for her treatment, which Illinois law explicitly protects. *Norskog*, 197 Ill. 2d at 73 (privilege protects "any communication" between a patient and therapist in connection with mental health treatment) (quoting 740 ILCS 110/2). The Illinois statute Defendants cite permits in camera review only when the privilege holder "introduces [her] mental condition or any aspect of [her] services received for such a condition as an element of [her] claim or defense." 740 ILCS 110/10(a)(1); *see Reda,* 199 Ill.2d at 56 (in camera review is appropriate

when the recipient of mental healthcare has "introduced [their] medical condition"). As established above, Ms. Smith has not done so. No review could alter the fact that these records fall squarely within the statutory privilege.

*Second*, Defendants attempt to put the cart before the horse. An in camera review is a limited tool available only when a party first establishes a "factual basis sufficient to support a reasonable, good faith belief that in camera inspection may reveal evidence that information in the materials is not privileged." *Grand Jury*, 974 F.2d at 1075. Defendants implicitly concede that they cannot meet this threshold by instead asking the Court to review the documents first to determine whether privilege applies. This circular reasoning is insufficient to justify in camera review. Defendants' attempt to exploit privilege law to access protected mental health records should be rejected.

**ATTESTATION**

I, Lexi J. Hazam, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

Dated: March 10, 2025

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